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No. 84-167

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

THE FIRESTONE TIRE & RUBBER COMPANY,
Appellant,
vs.
FRANCHISE TAX BOARD,
Appellee.

On Appeal from the Court of Appeal of the State of California for the Second Appellate District

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I.

A SUBSTANTIAL FEDERAL QUESTION HAS BEEN ADEQUATELY RAISED

The key substantive federal issue in this appeal is whether the California taxing statute[1], as applied to appellant in the context of a worldwide combined report, produces such distortions of income as are constitutionally impermissible under the Due Process and Commerce Clauses. This substantial federal question, contrary to the assertions of appellee [Motion of Appellee to Dismiss or Affirm "Motion", at p. 2], was raised and preserved at every stage of the litigation below, both in the complaint [C.T. pp. 15 et. seq]

[1] *California Revenue and Taxation Code* § 25101 [Stats. 1957 Ch. 2097 § 1].

and in the Notice of Appeal filed with the state court of appeal [C.T. p. 2176.] In the Petition for Hearing filed by appellant in the California Supreme Court, the questions presented included, *inter alia*, whether the "California ... apportionment formula, as applied ... to ... appellant ... in ... a worldwide combined report violate[d] the Due Process and/or Commerce Clauses of the [federal] constitution, where the distortion ... more than quadruple[d] that ... in *Container Corp. of America v. Franchise Tax Board.*"

Under this Court's own rules, the statement of a question presented "will be deemed to comprise every subsidiary question fairly included therein." United States Supreme Court Rule 15.1(a); cf. *New York Ex Rel Bryant v. Zimmerman*, 278 U.S. 63, 67, 73 L.Ed 184, 49 S.Ct. 61 (1928); *Braniff Airways v. Nebraska State Board*, 347 U.S. 590, 598-599, 98 L.Ed 967, 74 S.Ct. 757 (1954).

Obviously, the merits of the instant appeal will be taken under consideration only if the Court is convinced that the magnitude of distortion established by the record contravenes recognized parameters of Due Process. If this be the case, and appellant believes that it is, the Court may then proceed to examine the several causes of this result, the most prominent of which have been touched upon in the Jurisdictional Statement, under the rule that an appellant may raise different theories or arguments in support of the federal question raised in the state court. *Dewey v. City of Des Moines*, 173 U.S. 193, 197-198, 43 L.Ed 665, 19 S.Ct. 379 (1899).

NAACP v. Alabama, 357 U.S. 449, 2 L.Ed 2d 1488, 78 S.Ct. 1163 (1958), cited by appellee [Motion, p. 5] for the rule that issues not properly raised before the highest state court may not be raised in this Court, is therefore totally inapposite. *NAACP v. Alabama* held only that, on certiorari to review a contempt conviction for failure to comply with

a production order in a suit to enjoin an organization from conducting its activities in the state, this Court would not also review a temporary restraining order prohibiting the organization from soliciting funds pending resolution of the ouster suit, where the merits of the ouster suit had not yet been heard. Obviously, the procedural posture of the two cases cannot be compared.

II.

THE DISTORTION ISSUE IS NOT FORECLOSED BY PRIOR DECISIONS OF THIS COURT

Appellee urges that *Butler Bros. v. McColgan*, 315 U.S. 501, 86 L.Ed. 991, 62 S.Ct. 701 (1942), compels an affirmance of the decision below. Appellee's trite-worn reliance on *Butler Bros. v. McColgan* as an *ipso facto apologia* for any conceivable formulary result, no matter how distortive, is based apparently on the fact that in *Butler Bros. v. McColgan* a negative income was converted into a positive figure, meaning that the distortion factor was theoretically one of infinity. Under the reasoning of appellee, the result in *Butler Bros. v. McColgan* would sanction the use of any formulary method, no matter how skewed in favor of the taxing authority. "The suggestion that this Court, by its affirmance in *Butler Bros. v. McColgan*, put its imprimatur on such a result, is preposterous." This Court's own decisions lend no support to such a concept.

If appellee is correct in its argument, all further scrutiny of the distortion issue under the Due Process Clause would be totally foreclosed. This is obviously not the case, as witness this Court's consideration of the issue in *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 276, 57 L.Ed. 2d 197, 98 S.Ct. 2340 (1978), wherein the Court appears to have invited the taxpayer to produce any evidence, albeit based on so-called

"separate accounting", in support of its contentions with respect to distortion, and in *Container Corp. of America v. Franchise Tax Bd.*, — U.S. —, 77 L.Ed. 2d 545, 103 S.Ct. — (1983) Rhrg. Den. — U.S. —, 78 L.Ed. 248 (1983).

Many years prior to the decision in *Butler Bros. v. McColgan*, this Court upheld the use of a state formulary apportionment method, as applied to a single corporation taxpayer doing business both in this country and abroad, in a case where a negative income (for federal income tax purposes) had been converted to a positive income for state tax purposes. cf. *Bass, Ratcliff & Gretton v. State Tax Comm'n.*, 266 U.S. 271, 69 L.Ed. 282, 45 S.Ct. 82 (1924). If this example of an "infinite" distortion percentage were *ipso facto* to have precluded any further inquiry under the Due Process Clause with regard to the issue of distortion, the subsequent decision by this Court in *Hans Rees' Sons Inc. v. North Carolina*, 283 U.S. 123, 75 L.Ed. 879, 51 S.Ct. 835 (1931), would never have been reached. Clearly, just the opposite was the case. (In *Hans' Rees*, the decision of the state appellate court to the effect that the distortion which resulted from the single factor formula employed by the taxing authority was constitutionally permissible was reversed.) So much for the insistence by appellee that *Butler Bros. v. McColgan* precludes an examination of the distortion issue in the present context.

Appellee's attempt to distinguish *Hans Rees* is likewise to no avail. Even a shift of .0207 to .0372 of appellant's world-wide income to California represents a relative shift of approximately eighty (80%) percent, far in excess of that found acceptable in *Container*. Finally, contrary to the assertions of appellee, the *quid pro quo* for whatever intangible benefits may have been provided by appellant to its foreign subsidiaries were the "technical service" fees re-

ceived by appellant [cf. IRS Forms 2952, Exhbs. 618-657], all of which were represented in the tax base.[2]

III.

APPELLEE'S CLAIMS WITH RESPECT TO THE WEIGHT OF THE EVIDENCE ARE WITHOUT MERIT

Appellee adverts on several occasions to the argument that there is no "credible, admissible evidence in the record" to support, for example, an adjustment to the property factor on account of the Liberian leasehold [Motion, pp. 2, 7].

Appellee contends that the state trial court rejected appellant's proffered valuation evidence as unsubstantiated opinion testimony of a nonexpert witness [Motion, p. 3.] It is true that ordinarily questions respecting the weight of the evidence are for the trial court. *New York & Cumberland Railroad Co. v. Myers,* 59 U.S. 246, 252, 15 L.Ed. 380 (1855). Appellant further recognizes, of course, that as the taxpayer it had the burden of proof on this as well as on all other issues in the litigation below.

But in this particular instance the federal question (in so far as it addresses the question of factor relief under the Due Process Clause) would have remained, irrespective of the quantity of evidence on the issue, for the reason that appellant could not have produced, indeed did not have,

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[2]For example, in 1960 appellant received $30,492,611.54 in dividends and fees from its domestic and foreign subsidiaries [Ex. 932; Ex. 689 (IRS Form 1120, l. 4).] Of this amount, appellee specifically allocated to appellant's state of commercial domicile, i.e., removed from the latter's combined tax base, the sum of $29,077,465, representing intercompany dividend income [Ex. 382, Sch. I; Ex. 713 (Auditor's Schedule Ic).] The balance $1,415,146.54, representing technical service fees, remained in appellant's apportionable tax base.

the only type of evidence which, under the relevant statute and regulation, would have warranted an adjustment to the property factor of the formula and thus have resolved the federal issue. The California law, as applied to appellant, foreclosed any possibility of factor relief. The relevant state law permitted an adjustment only to the extent of the "depreciated net book value" of the leasehold on the books of appellant's Liberian subsidiary.[3]

Since, during the period in issue, the leasehold had no depreciated net book value on the books of appellant's Liberian subsidiary, the outcome of the federal issue (concerning the absence of factor relief) was preordained. Under analogous circumstances, this Court has authorized an appeal with respect to the federal issue. *Mills v. Alabama,* 384 U.S. 214, 217, 16 L.Ed. 2d 484, 86 S.Ct. 1434 (1966).

The issue here therefore is whether the California statute and regulation, as applied to appellant, in limiting an adjustment to the property factor to the amount representing the "depreciated net book value" of the leasehold, passes Constitutional muster where factor relief is precluded in the absence of any such book value.

Moreover, the evidence on the valuation of the Liberian leasehold was wholly uncontradicted. Thus, there was no question of weighing conflicting evidence in the record. Under long established precedent, this Court may review an evidentiary record to establish whether the lower court refused to find a fact material to the issues, when such fact was proven by uncontradicted evidence. *Alexandre v. Machan,* 147 U.S. 72, 77, 37 L.Ed. 84, 13 S.Ct. 211 (1893).

It is axiomatic that the Due Process Clause mandates factor relief in the case of appellant, where millions of

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[3]Title 18, *Calif. Adm. Code,* Reg. §25101(a).

dollars of income have been included in appellant's apportionable tax base on account of its foreign subsidiaries as well as its domestic subsidiary, Ravenna Arsenal, Inc. Such factor relief should take the form of appropriate adjustments to the various factors of the formula used by appellee to apportion appellant's income base, as noted in appellant's Jurisdictional Statement.

Appellee asserts that certain adjustment issues were not included in appellant's Petition for Hearing to the California Supreme Court [Motion, p. 2.] Appellant believes all such issues were adequately raised as part of the distortion issue in chief. Nevertheless, it is well established that a federal appellate court is justified in resolving an issue not passed on below, where the proper resolution is beyond any doubt. *Singleton v. Wulff*, 428 U.S. 106, 121, 49 L.Ed. 2d 826, 96 S.Ct. 2868 (1976).

IV.

THE STANDARD OF REVIEW ISSUE IS A VALID ONE

Appellee insists that appellant has misconstrued the "standard of review" to be applied by the state court of appeal in this case, based upon this Court's holding in *Container Corp. of America v. Franchise Tax Bd* [Motion, p. 8.] Appellant believes it has correctly set forth the issue in its Jurisdictional Statement, at pp. 26-28.

Moreover, it is to be noted that the state trial court found, on a disputed evidentiary record, that thirteen of appellant's twenty-two foreign subsidiaries were not part of its unitary business [C.T. p. 2008.] The state court of appeal, rather than determining whether the decision of the trial court was within the "realm of permissible judgment", made its own independent assessment of the conflicting factual record. This Court has held that, where there is a conflict in the evidence on a material issue, an

appellate court has no authority to substitute its own findings of fact for those of the trial court, and this Court may always perform its proper function of "deciding questions of law arising upon the findings which the evidence permits." *United Gas Public Service Co. v. Texas*, 303 U.S. 123, 143, 82 L.Ed. 702, 58 S.Ct. 483 (1938).

V.

CONCLUSION

For all of the reasons heretofore advanced by appellant, the motion to dismiss or affirm should be denied and probable jurisdiction should be noted.

DATED: September 7, 1984

Respectfully submitted,

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